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IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. § 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pled directly under the relevant constitutional provisions.

PARTIES TO THE PROCEEDING

Petitioner Kathleen Hawk Sawyer is the former Director of the Federal Bureau of Prisons. Sawyer is a defendant in the district court and an appellant in the court of appeals. Petitioner Michael Cooksey is the former Assistant Director for Correctional Programs of the Bureau of Prisons. Cooksey is a defendant in the district court and an appellant in the court of appeals. Petitioner David Rardin is the former Director of the Northeast Region of the Bureau of Prisons. Rardin is a defendant in the district court and an appellant in the court of appeals.

Respondent Javaid Iqbal is plaintiff in the district court and appellee in the court of appeals.

The other respondents are all defendants in the district court and appellants in the court of appeals: John Ashcroft, former Attorney General of the United States; Robert Mueller, Director of the Federal Bureau of Investigation; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in Charge of the Fedeal Bureau of Investigation's New York Field Office; Dennis Hasty, former Warden at the Metropolitan Detention Center in Brooklyn, New York.

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OPINIONS AND JUDGMENTS BELOW

On September 27, 2005, the United States District Court for the Eastern District of New York entered an order dismissing the majority but not all of the claims against petitioners. The opinion is unpublished but available as *Elmaghraby, et al. v. Ashcroft, et al.*, 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) and also reprinted in the Petition for Writ of Certiorari of Petitioners John Ashcroft and Robert Mueller ("App.") at 71a – 150a.[1] The United States

[1] Pursuant to Supreme Court Rule 12.5, appendix citations in this conditional cross-petition refer to materials appended to the Ashcroft and Mueller Petition for Writ of Certiorari.

Court of Appeals for the Second Circuit affirmed in part, reversed in part, and remanded the case on June 14, 2007; its opinion is reported at *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), and reprinted at App. 1a – 70a. Petitions for panel rehearing and rehearing en banc were denied by the Second Circuit on September 18, 2007. App. 151a – 52a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on June 14, 2007, and denied rehearing on September 18, 2007. On December 7, 2007, Justice Ginsburg extended the time for petitioners John Ashcroft and Robert Mueller to file a petition for a writ of certiorari to January 16, 2008.[2] On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008. On that date, the Solicitor General filed a petition for writ of certiorari on behalf of petitioners Ashcroft and Mueller. This conditional cross-petition is submitted pursuant to Supreme Court Rule 12.5.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

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[2] Dennis Hasty filed a petition for a writ of certiorari on December 17, 2007.

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1985(3) of Title 42 of the United States Code provides:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

A. Factual Background

This *Bivens*[3] action was brought by Javaid Iqbal ("respondent"), a citizen of Pakistan, who asserts that he was arrested and detained following the September 11, 2001 terrorist attacks by agents of the Immigration and Naturalization Service ("INS") and the Federal Bureau of Investigation ("FBI"), and held at the Metropolitan Detention Center ("MDC") in Brooklyn, New York until on or about January 15, 2003. *See* App. 157a, 169a (First Am. Compl. ("Compl.") ¶¶ 9, 80). Respondent was then transferred to an INS detention facility and eventually deported. He neither denies that he was in the

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[3] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

United States illegally, nor challenges the grounds for his detention.

Respondent filed his initial complaint on May 3, 2004 in the United States District Court for the Eastern District of New York and an amended complaint on September 30, 2004. In his amended complaint, respondent claims that various of his constitutional and statutory rights were violated while he was held at the MDC. He sued the United States and numerous federal officials in their individual capacities, including petitioners, the former Director, Assistant Director and Regional Director of the Federal Bureau of Prisons ("BOP"), and three other supervisory officials who are currently seeking a writ of certiorari — Ashcroft, Mueller, and Hasty.

In his amended complaint, respondent alleges that in January 2002, he was classified by defendants Rolince and Maxwell, as being "of high interest" to the government's investigation of the September 11 attacks. Respondent claims that as a consequence of this classification, he was housed in the MDC's Administrative Maximum Special Housing Unit ("ADMAX SHU") for approximately seven months. *See* App. 164a-65a, 169a (Compl. ¶¶ 51, 53, 81). He further asserts that while confined in ADMAX SHU, he was subjected to excessive physical force and verbal abuse; subjected to unlawful strip and body-cavity searches; denied medical treatment and adequate nutrition; detained unnecessarily in solitary confinement; denied adequate exercise; and denied the right to exercise his religious beliefs by the MDC staff because of his race, religion, and/or national origin. App. 170a-71a, 176a, 181a (Compl. ¶¶ 2, 87-89, 113, 136).

Respondent contends that the procedures that resulted in the alleged incidents of abuse were developed and implemented by defendants other than petitioners. *See* App. 165a (Compl. ¶ 58). He does not allege any facts to demonstrate that petitioners participated in, were notified about, or approved any of the alleged incidents of abuse. Further, respondent admits that defendants other than petitioners are responsible for his classification as "high interest," which resulted in his detention in the ADMAX SHU. *See* App. 164a-65a (Compl. ¶¶ 47-53).

Attempting to connect petitioners to these alleged violations, however, respondent makes only conclusory allegations that petitioners were "responsible for ensuring the safe and secure institutional environment" of the MDC, were "instrumental in the adoption, promulgation, and implementation" of the challenged "policies and practices," and "authorized, condoned, and/or ratified" them based solely on their supervisory positions within the Federal Bureau of Prisons ("BOP"). *See* App. 157a-58a (Compl. ¶¶ 14-16).

B. Proceedings Below

Various defendants, including petitioners, moved to dismiss the claims against them based on qualified immunity. The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1346(b), and 1350.

On September 27, 2005, the district court granted in part and denied in part petitioners' motions to dismiss. *See generally* App. 71a-150a. In relevant part, the district court dismissed respondent's Fourth Amendment claim (ninth cause of action), First Amendment claim (eleventh cause of action), Fifth

Amendment Equal Protection claim[4] (twelfth cause of action), Religious Freedom Restoration Act claim (thirteenth cause of action), and Alien Tort claims Act claim (twenty-first cause of action). The district court denied petitioners' motions to dismiss in regard to respondent's Fifth Amendment Due Process claim (second cause of action). Petitioners' motions to dismiss the claims asserted under 42 U.S.C. § 1985(3) (sixteenth and seventeenth causes of action) were granted in part and denied in part.

In his Section 1985(3) claims, respondent asserts that petitioners, among others, allegedly agreed "to deprive plaintiff[] of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of [his] sincere religious beliefs," and because of his "race and/or national origin" in violation of 42 U.S.C. § 1985(3). App. 206a, 208a (Compl. ¶¶ 247, 250); App. 90a. As the district court summarized with regard to petitioners, respondent had asserted the following conspiracy claims: (1) petitioners and other defendants "agreed to subject plaintiff[] to unnecessarily harsh conditions of confinement *without due process*"; and (2) petitioners and other defendants "agreed to subject plaintiff[] to unnecessary and extreme strip and body-cavity searches as a matter of policy." App. 90a (emphasis added).

The district court dismissed respondent's Section 1985(3) conspiracy claims to the extent that they related to the alleged strip and body-cavity searches,

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[4] The district court held that respondent failed sufficiently to allege petitioners' personal involvement, and hence petitioners were entitled to qualified immunity with regard to respondent's equal protection claims. App. 136a-37a.

noting that it had dismissed respondent's Fourth Amendment claim arising from the same alleged conduct on qualified immunity grounds. *Id.* at 145a ("plaintiff[] ha[s] not sufficiently alleged the personal involvement of the [petitioners] in subjecting them to 'unnecessary and extreme strip and body-cavity searches,' and the [petitioners'] motions [to dismiss on the basis of qualified immunity] are granted as to that alleged agreement"). Specifically with respect to this aspect of respondent's Section 1985(3) claims, the district court held that the "plaintiff[] ha[s] failed to adequately allege the involvement of [petitioners] in the challenged searches [under the 4th Amendment, and] . . . [a]s discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the [petitioners] in subjecting them to 'unnecessary and extreme strip and body-cavity searches,' and the [petitioners] motions are granted as to that alleged agreement." *Id.* at 145a; *see also id.* at 130a-31a.

To the extent that respondent's Section 1985(3) claims were based on an alleged procedural due process violation, the district court denied the petitioners' motion to dismiss because it had already concluded, when analyzing the Fifth Amendment due process claim in respondent's second cause of action, that respondent had sufficiently pled petitioners' personal involvement and that the law at the time of the events at issue was established with sufficient clarity to defeat petitioners' (and all other defendants') qualified immunity. App. 145a-46a.

Various defendants, including petitioners, appealed the district court's decision. Specifically, petitioners appealed the denial of qualified immunity with regard to respondent's Fifth Amendment due process

claim and his Section 1985(3) claims that sought remedy for the alleged due process violations. On appeal, the Second Circuit affirmed in part and reversed in part. App. 1a-70a. It directed dismissal of respondent's Fifth Amendment due process claim, finding that petitioners were entitled to qualified immunity, but affirmed with regard to respondent's Section 1985(3) claims, stating that such claims were alleged with sufficient particularity to survive a motion to dismiss. App. 46a, 65a.

Despite the court of appeals' finding that petitioners were entitled to qualified immunity with regard to the alleged due process violations and the district court's finding that petitioners were not personally involved in (and hence entitled to qualified immunity from) respondent's equal protection claims (*see supra*, note 4), the court of appeals nevertheless held that petitioners were not immune from respondent's Section 1985(3) claims. The disposition of the case thus far, however, leaves nothing on which respondent's Section 1985(3) claims can be based.

Further, the court of appeals expressed great concern regarding the pleading standard to be applied in a case addressing qualified immunity of government officials. After analyzing this Court's decisions in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 163 (2002); and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), it concluded that those decisions could not "be readily harmonized." App. 15a. The court acknowledged that it saw "some merit in the argument in favor of a heightened pleading standard" because (1) qualified immunity is an essential privilege that allows

government officials to perform their duties effectively without fear, and (2) a lesser standard, like the one the court of appeals ultimately applied, would allow some of respondent's claims, which were based largely on "generalized allegations of supervisory involvement," to survive a motion to dismiss, and therefore, facilitate "the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." App. 25a.

The court of appeals nevertheless concluded that it was bound by this Court's precedents and, drawing from this Court's recent decision in *Twombly*, applied what it described as a "more flexible 'plausibility standard.'" App. 25a-26a. The court of appeals ultimately held that, under this standard, respondent had sufficiently alleged Section 1985(3) claims, even though the court of appeals and the district court had determined that petitioners were entitled to qualified immunity on all of the underlying allegations that formed the bases of these Section 1985(3) claims.

Judge Cabranes, in his concurring opinion, noted the "uneasy" tension between this Court's interpretation of the general civil pleading requirements and the qualified immunity doctrine. He further emphasized that "some of the [Supreme Court's] precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." App. 68a. Nevertheless, Judge Cabranes concurred in the majority's disposition of the appeal, which he concluded was "troubling," but nonetheless compelled by relevant precedent. App. 70a.

REASONS FOR GRANTING THE CROSS-PETITION

The Second Circuit's decision misreads 42 U.S.C. § 1985(3) so as to convert the statute from a procedural mechanism for the vindication of enumerated rights into a vehicle for circumvention of both the pleading standards governing tort claims asserted directly under the Constitution and the contours of the qualified immunity protecting federal officials from such claims. It thereby contravenes both this Court's consistent construction of Section 1985(3), which establishes that the statute confers no substantive rights but rather a remedy for violation of the rights it specifies, and this Court's recent articulation of minimum pleading standards. *Twombly*, 127 S.Ct. 1955. Review by this Court is therefore warranted.

The Circuit's decision subjects senior Department of Justice officials to discovery and possibly trial on the basis of allegations that are indistinguishable from those the district court found insufficient to sustain claims pled directly under the relevant constitutional provisions, and that the Second Circuit itself held to be barred by those officials' qualified immunity. The Court of Appeals reached this anomalous, self-contradictory result by departing from this Court's rulings on the sufficiency of pleadings necessary to maintain claims brought pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Comparing respondent's Section 1985(3) claims to those at issue in *Twombly*, the Second Circuit erroneously concluded that those claims must be allowed to proceed.

As Judge Cabranes noted, this result affords a guide to future litigants on how to fashion *Bivens*

claims against federal officials charged with important law-enforcement and national-security responsibilities and will thereby unnecessarily subject those officials to the burdens of litigation. App. 70a. This result acquires heightened significance in the context presented in this case, where the claims are asserted against an entire Department of Justice chain of command extending from the Attorney General, through his senior Bureau of Prison directors, to institution-level supervisors and staff.

In order to state a cause of action under Section 1985(3), a complaint must allege that the defendants:

> did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or cause to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) (quoting 42 U.S.C. § 1985(3)). This Court has held that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Those rights "must be found elsewhere" in the law. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983).

Thus, in *Griffin*, the substantive rights found actionable pursuant to Section 1985(3) were the Thirteenth Amendment's absolute prohibition on slavery and the right to engage in interstate travel. 403 U.S. at 105-06; *see also, e.g., Hobson v. Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984) (political affiliation); *Ward v. Connor*, 657 F.2d 45, 47-48 (4th Cir. 1981) (members of Unification Church), *cert. denied*, 455 U.S. 907 (1982); *Hampton v. Hanrahan*, 600 F.2d 600, 623 & n.22 (7th Cir. 1979) (Black Panther Party), *cert. granted in part and rev'd in part on other grounds,* 446 U.S. 754 (1980). In *Novotny,* on the other hand, this Court concluded that rights "created by Title VII" of the 1964 Civil Rights Act could not be asserted "within the remedial framework of § 1985(3)." 442 U.S. at 377. And in *Carpenters,* the Court found that the statute could not reach a purely private conspiracy to deny First Amendment rights, because the First Amendment operated only as a limitation on governmental action. 463 U.S. at 830-31.

The necessity of an independently conferred right as a critical element of a claim under Section 1985(3) was reinforced in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993):

> Our discussion in *Carpenters* makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right. The right must be "aimed at," 463 U.S. at 833 (emphasis added); its impairment must be a conscious objective of the enterprise.

Id. at 275. The "intent to deprive a right" element of the statute "demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it." *Id.* at 276. An identified right, protected from infringement by the named governmental or private defendants, is thus an indispensable component of a viable claim under Section 1985(3).

Bray is instructive for the present case for an additional reason. The outcome in that case ultimately turned on this Court's determination that plaintiff's factual allegations lacked the requisite discriminatory animus to maintain an action under Section 1985(3). 506 U.S. at 274. Similarly, in this case, the district court found that respondent had failed to allege any facts to show that petitioners were personally involved in the classification of respondent and other detainees on the basis of their national origin or religion. App. 136a.[5]

Prior decisions of the Second Circuit reflected an understanding of Section 1985(3) that comported with this Court's jurisprudence. *See, e.g., Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 527 (2d Cir. 1996) ("[Section 1985(3)] creates no substantive rights but merely 'provides a remedy for violation of the rights it designates'") (quoting *Novotny*, 442 U.S. at 372); *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) ("[I]n order to state a claim under § 1985(3), [a plaintiff] must allege . . . [deprivation] of a right covered by the Constitution or other laws."). Other circuits have done the same. *See, e.g., Federer*

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[5] The district court's favorable resolution of this question meant that the issue was not presented to the Second Circuit.

v. Gephardt, 363 F.3d 754, 758 (8th Cir. 2004) ("[P]laintiff must allege that an independent federal right has been infringed. Section 1985(3) is a statute which provides a remedy, but it grants no substantive stand-alone rights. The source of the right or laws violated must be found elsewhere."); *Dixon v. City of Lawton*, 898 F.2d 1443, 1448 (10th Cir. 1990) (Section 1985 is a "procedural statute[] which provide[s] a remedy for deprivation of existing rights"); *Harrison v. KVAT Food Mgmt.*, 766 F.2d 155, 162 (4th Cir. 1985) (same); *Hobson*, 737 F.2d at 15 ("The rights protected by section 1985(3) exist independent of the section and only to the extent the Constitution creates them.").

Notwithstanding its own prior decisions and the consistent rulings of other circuits, the Second Circuit's decision in this case gives life to claims under Section 1985(3) that are indistinguishable from those determined by the Circuit itself and the district court to lack viability when pled directly under the pertinent constitutional provisions. The second cause of action in the amended complaint alleges that petitioners had subjected respondent to unnecessarily harsh conditions of confinement in violation of his right to procedural due process under the Fifth Amendment. The district court found that the complaint alleged a violation of a constitutional right, holding that a protectable liberty interest existed; that the right had been clearly established at the time of the alleged violations; that the objective reasonableness of petitioners' actions could not be addressed until after discovery; and that petitioners' personal involvement had been sufficiently alleged to warrant limited discovery. App. 113a-18a. The sixteenth and seventeenth cause of action set out

respondent's claims brought under Section 1985(3). As the district court noted, App. 142a, the Section 1985(3) claims identified three rights allegedly infringed by petitioners and other defendants: respondent's right to procedural due process; his right against unreasonable searches and seizures; and his right to engage in the free exercise of his religion. The religious exercise component of these claims was not pled against petitioners. App. 142a. The strip search component was found deficient as to petitioners by the district court for the same reason that it found wanting the claims pled directly under the Fourth Amendment in the ninth cause of action: a failure to plead sufficient facts to show the personal involvement of petitioners. App. 130a-31a, 145a. This left only the procedural due process facet of the 1985(3) claims. The district court sustained that portion of the two claims without detailed discussion. App. 145a-146a.

On appeal, the Second Circuit held that the Fifth Amendment procedural due process claim asserted in the second cause of action was barred as to all defendants by their qualified immunity. App. 46a. Nevertheless, it concluded that the claims asserted against petitioners under Section 1985(3) in the sixteenth and seventeenth cause of action survived petitioners' motions to dismiss. App. 65a. This result cannot be reconciled with this Court's construction of that statute and the need for plaintiffs to identify independent sources of actionable rights. It has the effect of making Section 1985(3) a mechanism for avoiding the pleading standards otherwise applicable to *Bivens* claims, and thereby depriving federal officials of qualified immunity to which they would otherwise be entitled.

Careful review of its decision reveals that the district court clearly recognized these fundamental principles. As noted above, in denying petitioners' motion to dismiss the second cause of action, the district court found that the complaint alleged a violation of a constitutional right and that the right had been clearly established, and addressed the objective reasonableness of the petitioners' actions. In denying the motion to dismiss with respect to the Section 1985(3) claims, however, the district court did not address the questions of whether a violation of a constitutional right had been alleged insofar as the complaint asserted that petitioners had conspired to deny respondent procedural due process, or whether that right had been clearly established — the heart of the qualified-immunity analysis — because it had already answered those questions with respect to the underlying right at issue in the course of sustaining the second cause of action.[6]

Similarly, in granting petitioners' motion to dismiss the Section 1985(3) claims insofar as they alleged a conspiracy to violate respondent's by subjecting him to strip and body-cavity searches, the district court did not address the questions of whether a constitutional violation had been alleged or whether the right at issue had been clearly established. Rather, it simply referred to the earlier portion of its decision where it had dismissed respondents' ninth cause of action, which directly alleged a violation of his Fourth Amendment rights. *See* App. 145a.

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[6] Instead, the district court focused on the issues of whether (1) section 1985(3) applied to federal officials; and (2) the respondent had sufficiently alleged personal involvement on the part of petitioners in the alleged conspiracy. See App. 142a-45a.

In short, although the district court did not explicitly address the issue, the methodology it employed demonstrates that it understood the law to be that violation of an independently conferred right is a prerequisite for a Section 1985(3) claim. It is thus apparent that the only reason that the district court did not dismiss the portion of the Section 1985(3) claims at issue here was that it had not dismissed the second cause of action, which directly alleged a violation of the underlying constitutional right to procedural due process.

This Court recently held that in order to survive a motion to dismiss, a complaint must allege more than "labels and conclusions." *Twombly,* 127 S.Ct. at 1965. The factual allegations "must be enough to raise a right to relief above the speculative level . . . ." *Id.* (citing *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002)); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (other citations omitted). For the Sherman Act conspiracy claims at issue in *Twombly,* there was a "need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement" between the defendants. 127 S. Ct. at 1966. Measuring the complaint at issue there against this standard, this Court found that "plaintiffs' claim of conspiracy in restraint of trade comes up short." *Id.* at 1970. Scrutiny of statements suggesting direct evidence of agreement revealed that, "on fair reading, these are merely legal conclusions resting on the prior allegations." *Id.* More broadly, apart from alleging a seven-year time frame for the alleged violations, the complaint "mentioned no specific time, place, or person involved in the alleged conspiracies." *Id.* at n.10.

But with respect to respondent's Section 1985(3) claim in the present case, petitioners are not confronted with allegations even "consistent with," let alone plausibly suggestive of, unlawful conspiratorial conduct on their part. *Id.* at 1966. As the district court found, they are not alleged to have participated in the classification of respondent and other detainees on the basis of national origin, ethnicity or religion. App. 136a. *A fortiori,* the allegations against them do not, and cannot, rise to the level of plausibility required by *Twombly*.

The Second Circuit's reliance on this Court's opinion in *Crawford-El v. Britton,* 523 U.S. 574 (1998), was also misplaced. In *Crawford-El*, the plaintiff alleged specific acts of misconduct by defendant and included in his allegations specific statements of that defendant from which an unconstitutional motive could be inferred. *Id.* at 579 & n.1. Here, as the district court found, no such particularized allegations put petitioners into the midst of the alleged conspiracy under Section 1985(3).

Moving beyond the threshold elements of respondent's Section 1985(3) claims, additional deficiencies emerge. For resolution of the strip-search component of those claims, the district court looked to its analysis of respondent's Fourth Amendment allegations set forth in the ninth cause of action. It had found that the Amended Complaint had failed to allege adequately the personal involvement of the petitioners in that claim. App. 145a.[7] The district court acknowl-

[7] It was unclear to the district court whether the claim was even asserted against petitioners Cooksey and Rardin, but to the extent it was, dismissal was proper in the district court's view for the same reason that mandated dismissal of the claim

edged that petitioners' involvement in the strip searches was alleged "in conclusory fashion" but found that "those boilerplate allegations" conflicted with other, specific allegations set forth elsewhere in the Amended Complaint that attributed the development of procedures for handling respondent (and other detainees) to other defendants. App. 130a-31a.

Applying this reasoning to respondent's Section 1985(3) claims predicated on alleged strip and body-cavity searches, the district court stated that "[a]s discussed in connection with plaintiffs' Fourth Amendment claim, [respondent has] not alleged the personal involvement of [petitioners] in subjecting [him] to 'unnecessary and extreme strip and body-cavity searches,'" and, therefore, ruled that the parallel claim asserted under Section 1985(3) was dismissed. App. 145a.[8]

This favorable ruling for petitioners was not squarely at issue before the Second Circuit in the interlocutory appeal from the denial of petitioners' immunity defense to other claims. Yet the Circuit's determination that respondent's Section 1985(3) claims survived dismissal undercuts the district court's determination relating to the strip-search component of those claims. That outcome is squarely at odds with this Court's construction of the pleading requirements necessary to survive dismissal.

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against petitioner Sawyer — lack of sufficient allegations of personal involvement. App. 131a n.24.

[8] The procedural due process element of respondent's Section 1985(3) claims survived the motions to dismiss, but that was consistent with the district court's treatment of the corresponding procedural due process claim asserted under the Fifth Amendment and set forth in the second cause of action.

The Second Circuit's ruling on respondent's Section 1985(3) claims also has the effect of depriving petitioners of their right to qualified immunity, a right confirmed by the Second Circuit itself in directing dismissal of respondent's Fifth Amendment procedural due process claim on immunity grounds. Government officials enjoy qualified immunity from suit and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Qualified immunity has been held to protect federal officials even if constitutional violations have occurred. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."); *Wilson v. Layne*, 526 U.S. 603, 614 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In *Wilson v. Layne*, this Court held that law enforcement officers violated the Fourth Amendment by bringing members of the media into a home while executing an otherwise valid warrant when the media's presence was not in aid of the execution of the warrant. 526 U.S. at 614. However, this Court also held that while the constitutional right at issue was violated, it was not clearly established, and therefore the officers were entitled to qualified immunity. *Id.* at 614-17. That result was mandated because "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 615; *accord Brosseau*, 543 U.S. at 199. The relevant test of "whether a right is clearly established is whether it

would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Wilson*, 526 U.S. at 615; *Anderson* 483 U.S. at 640. This inquiry must be made within "'the *specific context of the case*, not as a broad general proposition.'" *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201-02) (emphasis added); *Wilson*, 526 U.S. at 615; *Anderson* 483 U.S. at 640; *see also Gittens v. LeFevre*, 891 F.2d 38, 42 (2d Cir. 1989) ("[t]he inquiry is not whether plaintiff has alleged a violation of an abstract legal standard, but whether under the particular circumstances alleged, defendants could have reasonably believed that they did not violate plaintiff's constitutional rights").

The Second Circuit properly determined here that the contours of Fifth Amendment due process jurisprudence were not established with sufficient clarity to overcome petitioners' qualified immunity. App. 46a. Inexplicably, however, it effectively ignored that determination in holding the Section 1985(3) claim — which as to petitioners by then included only a procedural due process claim indistinguishable from that alleged under the Fifth Amendment — sufficient to survive dismissal, thereby negating the very immunity protection it had already accorded petitioners.

This outcome undermines the fundamental purpose of the qualified-immunity doctrine, which was formulated precisely to guarantee "the vigorous and fearless performance" of law enforcement duties "essential to the proper functioning of the criminal justice system." *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976); *see also Harlow*, 457 U.S. at 814 (*Bivens* suits impose a heavy cost "not only to the defendant officials, but to society as a whole," includ-

ing "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"); *Owen v. City of Independence*, 445 U.S. 622, 655 (1980) (the doctrine avoids "introduc[ing] an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment."); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) ("[T]he danger that the threat of [ ] liability would deter [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good.").

These concerns have special significance in the unprecedented national security and law enforcement settings in which this case arises. This Court has expressly left open the possibility that "terrorism or other special circumstances" may provide "special arguments" for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). The Second Circuit properly determined that the law, for purposes of qualified immunity, was not clearly established at the time the events in this case took place. App. 46a; *see also Wilson*, 526 U.S. at 616 (observing that there were "no judicial opinions holding that [a media ride-along] became unlawful when it entered a home," and therefore, the law was not clearly established). That determination should not be negated by a construction of Section 1985(3) that renders it a substitute vehicle for asserting a violation of the underlying right supposedly violated, judged by some lesser pleading standard and capable of defeating official immunity more easily than

identical claims fashioned under pertinent provisions of the Constitution.

CONCLUSION

For the foregoing reasons, Kathleen Hawk Sawyer, Michael Cooksey and David Rardin respectfully submit that if this Court grants the petition for a writ of certiorari in Docket No. 07-1015, it should also grant this conditional cross-petition.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER, MICHAEL COOKSEY, AND DAVID RARDIN,

Cross-Petitioners,

v.

JAVAID IQBAL, ET AL.,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAVAID IQBAL

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IN THE

Supreme Court of the United States

No. 07-1150

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Should the Court grant certiorari in *Ashcroft v. Iqbal*, No. 07-1015, cross-petitioners conditionally ask this Court to address the following question: whether the Second Circuit properly permitted certain of respondent's claims to proceed under 42 U.S.C. § 1985(3), even as it dismissed certain claims that cross-petitioners believe involve the same rights at stake in respondent's Section 1985 claims. Even if the petition in No. 07-1015 is granted, the conditional cross-petition should be denied for several reasons, most prominently because it is in actuality not a cross-petition but simply an untimely filed petition for writ of certiorari. Putting aside this jurisdictional barrier, the cross-petition seeks error-correction of a

most limited kind because cross-petitioners' argument reduces to a complaint about the possibility of unresolved and unacknowledged tension in the Second Circuit's opinion. In fact, the tension suggested by cross-petitioners does not exist, and in any event is not independently cert-worthy. Nor do cross-petitioners identify any conflict between the circuits regarding the question presented, and their argument that the decision below conflicts with this Court's interpretation of Section 1985(3) ultimately fails. Indeed, cross-petitioners concede that the Second Circuit has consistently adhered to this Court's guidance regarding Section 1985(3). There thus are no good grounds for granting the cross-petition, and many sound reasons to deny it.

COUNTERSTATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on June 14, 2007, and denied rehearing on September 18, 2007. Warden Dennis Hasty, petitioner in *Hasty v. Iqbal*, No. 07-827, filed a timely petition on December 17, 2007. Petitioners John D. Ashcroft and Robert Mueller requested and received extensions of time by which to file a petition for writ of certiorari, and filed their timely petition on February 6, 2008. Cross-petitioners never requested an extension of time to file a petition. Instead, they filed the instant conditional cross-petition within 30 days of the filing of the petition in *Ashcroft v. Iqbal*, No. 07-1015. Because cross-petitioners support the position of petitioners in Nos. 07-1015 and 07-827, they are bound by the same filing deadlines, such that their conditional cross-petition is untimely. Sup. Ct. Rule 12.6; *infra* Part I. Accordingly, this Court does not have jurisdiction over the cross-

petition. *E.g.*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90-91 (1994); Sup. Ct. Rule 13.2.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal[1] was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). While on the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171).

After he was deported, Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that cross-petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

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[1] Although Mr. Iqbal is denominated a cross-respondent, he will be referred to as "respondent" throughout this brief.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were cross-petitioners, Kathleen Hawk Sawyer, former Director of the Bureau of Prisons ("BOP"), Michael Cooksey, former Assistant Director for Correctional Programs of the BOP, and David Rardin, former Director of the Northeast Region of the BOP.

Each of the cross-petitioners took steps necessary to unlawfully confine Mr. Iqbal in the ADMAX SHU. On or about October 1, 2001, cross-petitioners Sawyer and Cooksey issued an order directing that September 11 detainees be held at BOP facilities under maximally restrictive conditions until cleared by the FBI. App. 168a (Compl. ¶¶ 70-71). Cross-petitioners approved the suspension for September 11 detainees of formally promulgated BOP regulations requiring individualized findings of a necessity for administrative segregation like that imposed on the ADMAX SHU. *Id.* 157a-158a, 166a-168a, 172a-173a (Compl. ¶¶ 14-16, 64-68, 95-97). Indeed, it was cross-petitioner Cooksey who had the final responsibility to approve respondent's release to the general population of the MDC. *Id.* 167a-168a (Compl. ¶ 68.). Finally, cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin. *Id.* 172a-173a (Compl. ¶¶ 96–97).

3. Prior to engaging in discovery, in October 2004, several defendants and cross-petitioners filed motions to dismiss respondent's complaint. Among other arguments, cross-petitioners asserted that the complaint should be dismissed under Rule 12(b)(6)

on the ground of qualified immunity. The district court permitted claims to proceed against cross-petitioners both for violations of Section 1985(3) and for violations of respondent's procedural due process rights. The court noted that "the post-September 11 context" supported respondent's assertion of cross-petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient.[2] Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to cross-petitioners, the appellate court found that respondent stated a claim for violation of his Fifth Amendment due process right, but that the right was not clearly established at the time of the alleged violations. *Id.* 31a-46a. However, the court of appeals found that respondent's Section 1985(3) claims survived against cross-petitioners. *Id.* 63a-65a. Cross-

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[2] The district court also found support for respondent's allegations in the Government's own investigation of the treatment of September 11th detainees at the MDC, citing portions of an April 2003 Report by the Office of Inspector General of the Department of Justice. App. 116a n.20. As the district court noted, the April 2003 report suggests that cross-petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.* (citing to portions of investigation that implicated cross-petitioners Sawyer, Cooksey, and Rardin).

petitioners had argued that the Section 1985(3) claims should be dismissed for two related reasons: because Section 1985(3) did not apply to federal officials; and because even if it did apply to such officials, it was not "clearly established" at the time that Section 1985(3) applied to federal officials and therefore qualified immunity was available. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36).

The Court of Appeals decidedly rejected both of these arguments. App. 63a-65a. In so doing, the court made the following statement regarding the clearly established nature of the right at issue:

> [E]ven without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the *Equal Protection Clause*.

Id. 65a (emphasis added).

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition suggests that this Court intervene to resolve what is an alleged internal tension within the Second Circuit's opinion: on the one hand, according to cross-petitioners, the court below affirmed the district court's refusal to dismiss certain claims under Section 1985(3) that alleged a conspiracy to discriminate against respondent by placing

him in "unnecessarily harsh conditions . . . without due process of law," App. 206a-208a (Compl. ¶¶ 247, 250); on the other hand, the Second Circuit found that respondent's Fifth Amendment procedural due process claim was barred by qualified immunity because, although respondent stated a claim for violation of due process, that right was not clearly established at the time of the alleged violation. Cross-petitioners argue that the Second Circuit's affirmance of the district court's Section 1985(3) claim therefore violates a fundamental rule about Section 1985(3): a plaintiff must identify an independent constitutionally-protected right that was violated by the conspiracy, because Section 1985(3) does not create any substantive rights on its own. On petitioner's account, because there is no viable procedural due process claim, there can be no viable claim for conspiracy to deprive respondent of due process.

To state the logic of the cross-petition is to identify one principal reason not to grant certiorari: it requests error-correction of a most limited kind. This becomes even more obvious when one realizes that cross-petitioners identify no relevant circuit split, and concede that the Second Circuit has consistently adhered to the very legal rule that cross-petitioners claim was violated by the decision below. Moreover, cross-petitioners' claim that the Second Circuit's decision is in conflict with this Court's decisions is incorrect. The decision below does not even address the legal rule that cross-petitioners seek to vindicate here because none of the arguments made in the cross-petition was ever presented to the Second Circuit. Moreover, as shown above, the Second Circuit clearly interpreted respondent's Section 1985(3) claims to be rooted in the Equal Protection Clause, not the Due Process Clause. App. 65a (referring to

clarity of law regarding discrimination that would violate Equal Protection Clause).

But aside from these issues of error correction and waiver, there is a significant jurisdictional barrier to the cross petition: the cross-petition is in actuality an untimely filed petition for writ of certiorari, because cross-petitioners do not in any way express interests contrary to that of any of the other petitions filed seeking review of the Second Circuit's decision, and their arguments are no different from those made by petitioner Hasty in No. 07-827 and petitioners Ashcroft and Mueller in No. 07-1015. Indeed, it is evident from proceedings in the district court that cross-petitioners only filed this cross-petition to obtain a stay of discovery in district court, not because they actually disagreed with any of the legal positions taken by petitioners in Nos. 07-1015 or 07-827 or because their interests were threatened by either of those petitions.

For these reasons, respondent respectfully requests that this Court dismiss the cross-petition for lack of jurisdiction, or in the alternative deny the cross-petition.

I. THE CROSS-PETITION HAS NOT BEEN TIMELY FILED

We begin with the jurisdictional barrier to the cross-petition. Supreme Court Rules 12 and 13 set forth the relevant timelines for seeking discretionary review on certiorari of a court of appeals' decision. Pursuant to Rule 13.1, a petition for writ of certiorari must be filed within 90 days of the decision below, or December 17, 2007 in this case. Cross-petitioners neither filed their cross-petition by this date, nor sought an extension of time. As such, their cross-

petition must be in conformity with Rule 12.5, which provides that "[n]o more than 30 days after a case has been placed on the docket, a respondent" must file a conditional cross-petition if it is to be considered timely. The question thus becomes whether the conditional cross-petition is timely, it must be determined whether cross-petitioners are "respondent[s]" entitled to file an otherwise untimely petition for writ of certiorari.

Cross-petitioners here should not be considered "respondent[s]" for purposes of having the right to file an otherwise untimely cross petition in *Ashcroft v. Iqbal*, No. 07-1015. Supreme Court Rule 12.6 states that "[a]ll parties other than the petitioner are considered respondents, *but any respondent who supports the position of a petitioner* shall meet the petitioner's time schedule for filing documents." Sup. Ct. R. 12.6 (emphasis added). That is, if cross-petitioners here are deemed to "support[] the position" of petitioners Ashcroft and Mueller, they are not entitled to file a conditional cross-petition under Rule 12.5 because they would have to meet the time requirements imposed for petitioners in No. 07-1015.

This basic framework is consistent with the rationale for permitting conditional cross-petitions: to protect the interests of the party who prevailed in large part below, but who did not prevail on every argument. This party might accept the lower court decision and therefore not file an initial petition for certiorari. However, once that party's adversary files a petition for certiorari, the party may reason that, if the Court exercises its certiorari jurisdiction to review those matters on which the party prevailed, there is no reason not to ask the Court to also review those matters on which the party did not prevail. *United States v. Reliable Transfer Co.*, 421 U.S. 397,

401 n.2 (1975) (purpose of cross-petition is to permit respondent to ask Court to "enlarge its rights"); *see also Missouri v. Jenkins*, 495 U.S. 33, 41 n.8 (1990) (respondent may not challenge a portion of the lower court's judgment without filing a cross-petition).

Where a party has overlapping interests with a petitioner, as cross-petitioners do with petitioners Ashcroft and Mueller, however, none of the objects of permitting the filing of a cross-petition is met. Here cross-petitioners' interests were unaffected when the petition in No. 07-1015 was filed, because the petition did not create the risk that the Court could deprive cross-petitioners of a favorable ruling below by granting the petition in No. 07-1015. This explains why the Court permits respondents to file cross-petitions after the deadline for filing a petition has passed—*except* where, as here, the respondent supports the position of the petitioner.

Applied here, there is no colorable argument that cross-petitioners take any position in conflict with the petition in No. 07-1015 (or the petition in *Hasty v. Iqbal*, No. 07-827, for that matter). Nor is there any argument that cross-petitioners are indifferent as to the arguments raised by petitioners. And any reasonable reading of the cross-petition leads inexorably to the conclusion that cross-petitioners support the position of petitioners Ashcroft, Mueller, and Hasty.[3] In the district court and on appeal, petitioners and cross-petitioners made nearly identical arguments for why respondent's complaint should be

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[3] Indeed, cross-petitioners here do not even go through the motions of listing petitioners Ashcroft and Mueller, the petitioners in 07-1015, as cross-respondents. Rather, they list respondent Javaid Iqbal as a cross-respondent even though Mr. Iqbal has not filed any petition in this Court.

dismissed.[4] And now, petitioners and cross-petitioners both argue that the Second Circuit erred in affirming the denials of their motions to dismiss, for similar reasons. Cross-petitioners argue, just like petitioners in Nos. 07-1015 and 07-827, that the Second Circuit misapplied this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Cross-Pet. 18-20. Cross-petitioners argue, just like the other petitioners, that the complaint's allegations regarding their personal involvement are "conclusory" and not sufficiently factual, and that the Second Circuit's decision undermines the qualified immunity defense. Cross-Pet. (i), 21-24. That cross-petitioners assert an additional argument not proffered by petitioners, namely that the Second Circuit's treatment of respondent's Section 1985(3) claim is in tension with its treatment of other claims, does nothing to save their petition, because this does not make cross-petitioners any less supportive of the positions advocated by petitioners.[5]

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[4] They all argued that they were entitled to qualified immunity for similar reasons, and that respondent's allegations were too "conclusory" to establish their personal involvement in the alleged constitutional violations. App. 11a-12a. To the extent there was any variance in their arguments, the cross-petition does not hinge on those differences. App. 15a (noting that cross-petitioner Cooksey, as opposed to other appellants, "explicitly urges us to adopt a heightened pleading standard in *Bivens* actions").

[5] It might also bear asking when this case was "placed on the docket" within the meaning of Rule 12.5. There are two possible answers: December 20, 2007, when the petition in *Hasty v. Iqbal*, No. 07-827, was placed on the docket; or February 6, 2008, when the petition in *Ashcroft v. Iqbal*, No. 07-1015, was placed on the docket. Both petitions seek review of the same decision below, which cross-petitioners also seek to review. And there is no indication that the cross-petition relates in any particular way to the petition in 07-1015 instead of 07-827. Thus,

That the cross-petition is in reality an untimely petition masquerading as a conditional cross-petition is confirmed by the circumstances of its filing. At a December 20, 2007 appearance before the magistrate judge supervising discovery, cross-petitioners indicated they had no intention of filing a petition for writ of certiorari because they interpreted the Second Circuit's decision to mean that no viable claims remained against each of them. (Tr. Of Dec. 20, 2007, Conference at 51.) In response to this argument, the magistrate judge directed cross-petitioners to either file a motion to dismiss the claims before the district court or answer the complaint and respond to outstanding discovery requests.

Pursuant to local rule, cross-petitioners then filed a pre-motion conference letter with the district court, indicating their intention to move to dismiss respondent's claims based on their interpretation of the Second Circuit's decision. (Jan. 16, 2008, Letter to District Judge (Dist. Ct. Docket No. 520)). The district court referred the motions to the magistrate judge, who held a premotion conference on February 20, 2008. At the conclusion of that conference, the Court set a deadline by which cross-petitioners had to file their motion to dismiss, and directed that regardless of whether the cross-petitioners filed a motion to dismiss, "any previously entered stay of discovery with respect to these defendants is lifted, and responses to plaintiffs' outstanding written discovery demands is due 3/24." (Docket Entry dated February 21, 2008).

Although the petition in No. 07-1015, the supposed object of the cross-petition, was filed on Febru-

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it is unclear why the time for filing this cross-petition would not begin running when 07-827 was placed on the docket.

ary 6, 2008, it was not until *after* the February 20 conference when cross-petitioners sought approval from the Department of Justice to have their attorneys compensated for the time spent on the certiorari petition. (March 21, 2008, Letter to Magistrate Judge at 4 (Dist. Ct. Docket No. 532)). Moreover, cross-petitioners never filed their motion to dismiss. All of this suggests quite powerfully that the purpose of filing the cross-petition was not to expand on a favorable ruling below that was threatened by the petition in this matter, but to avoid discovery in the district court.

If cross-petitioners are considered respondents for purposes of the petition in No. 07-1015, then in any case in which multiple parties appear on one side or another, they will be permitted to delay filing certiorari petitions whenever one of their co-defendants or co-plaintiffs files a petition. Not only is this inconsistent with the purposes of permitting conditional cross-petitions, but it also works to the substantial prejudice of a respondent such as Mr. Iqbal. In response to the original petition filed in this matter, Mr. Iqbal had the option of filing a conditional cross-petition to seek to expand favorable portions of the Second Circuit's decision, particularly if they related to the topics on which petitioners sought certiorari. However, in response to the cross-petition filed by cross-petitioners, Mr. Iqbal has no ability to file a conditional cross-petition, even though the cross-petition is the only document filed with this Court which implicates the one aspect of the Second Circuit's decision on which Mr. Iqbal did not prevail. Thus, if the instant petition is considered a timely filed cross-petition, cross-petitioners will have achieved a significant advantage at Mr. Iqbal's expense by not filing their petition until after their co-

defendants. For the foregoing reasons, respondent respectfully request that the Court dismiss the cross-petition as untimely.

II. THE SECOND CIRCUIT'S DECISION IS FULLY IN ACCORD WITH THIS COURT'S SECTION 1985 PRECEDENT AND WITH THE DECISIONS OF OTHER CIRCUITS

Should the Court find that the cross-petition was timely filed, and that certiorari should be granted in *Ashcroft v. Iqbal*, No. 07-1015, it should nonetheless deny the cross-petitioners' request for certiorari. The arguments made by cross-petitioners are ultimately error-correcting ones because they suggest the need to correct an alleged tension within the Second Circuit's opinion. And, because when correctly read, the Second Circuit's opinion is completely consistent, cross-petitioners' request for error-correction is not, under any standard, certworthy.

a. Cross-petitioners first claim that the Second Circuit's decision contravenes this Court's construction of Section 1985(3). But in so doing cross-petitioners misstate the import of the Second Circuit's decision. This Court has held, and the Second Circuit has recognized, that Section 1985(3) does not create a substantive cause of action, but "merely provides a remedy for violation of the rights it designates," rights which must exist independently of Section 1985. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522, 527 (2d Cir. 1996). And the protected right, as cross-petitioners correctly state, must be

protected from infringement by the named governmental or private defendant. Cross-Pet. 14. Up to this point respondent is in agreement with cross-petitioners.

The next several steps in cross-petitioners' analysis are the point of departure for respondent. First, cross-petitioners state that the district court identified the three protected rights at issue in respondent's Section 1985(3) claims, generally, as the right to procedural due process, the right to be free of unreasonable searches and seizures, and the right to engage in the free exercise of religion. Cross-Pet. 16 (*citing* App. 142a). Next, cross-petitioners state that the only claims pleaded against cross-petitioners that were at stake in the Second Circuit were the Section 1985(3) claims, which alleged a conspiracy to deprive respondent of his right to procedural due process. Cross-Pet. 16. Finally, cross-petitioners note that the Second Circuit held that respondent's Fifth Amendment due process claim was barred by qualified immunity.[6] *Id.* Cross-petitioners conclude that, if respondent's substantive Fifth Amendment claim was barred by qualified immunity, by extension, respondent's Section 1985(3) claim should not have survived. *Id.* The Second Circuit's contrary result, according to cross-petitioners, is inconsistent with this Court's requirement that Section 1985(3) plaintiffs "identify independent sources of actionable rights." *Id.* For several reasons, cross-petitioners' argument fails.

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[6] Notably, the Second Circuit held that respondent had alleged a violation of due process, but that his right to procedural due process was not clearly established at the time of the alleged violation. App. 31a-46a.

First, neither cross-petitioners, nor any other party, raised before the Second Circuit the issue of what "independent sources of actionable rights" are implicated by respondent's Section 1985(3) claims. The only arguments made below by cross-petitioners were that Section 1985(3) does not apply to federal officials; and that even if it did, it was not clearly established in 2001 that Section 1985(3) applies to federal officials. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36). There thus was no reason for the Second Circuit to address the issue raised here—and indeed the Second Circuit did not address it. Therefore, to the extent there is any tension in the Second Circuit's opinion, it is neither expressed nor acknowledged; it can only be found if one accepts the inferences from the opinion sought to be drawn by cross-petitioners. Nor did cross-petitioners seek rehearing or rehearing *en banc* regarding this alleged contradiction within the Second Circuit's own opinion, again depriving the Second Circuit of the opportunity to address the argument made here by cross-petitioners.[7]

This is significant because cross-petitioners acknowledge that the Second Circuit itself has applied correctly the legal principle cross-petitioners seek to vindicate. Cross-Pet. 14. Given that the Second Circuit did not even discuss the issue presented here, there is no reason to conclude that the decision below marks a departure from the Second Circuit's prior precedent. At best, then, cross-petitioners seek error correction of an implied conflict between the Second Circuit's decision in this case and its decisions in

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[7] And as already noted, cross-petitioners elected not to pursue a motion to dismiss in district court after remand from the Second Circuit.

past Section 1985(3) cases. This is an independent reason not to grant certiorari on the question presented by cross-petitioners.

b. The cross-petition also should be rejected because there is no conflict between the decision below and the requirement that a Section 1985(3) claim allege a violation of an independent substantive right.

We begin with the first step of cross-petitioners' analysis, their contention that the district court held that the Section 1985(3) claim that related to cross-petitioners was grounded in the same due process right that was the basis for respondent's Fifth Amendment claim. Cross-Pet. 16. This contention is necessary for cross-petitioners to sustain their argument, because they acknowledge that none of these issues was discussed in the Second Circuit's opinion. As an initial matter, there is no sound reason for binding the Second Circuit to particular language used by the district court, especially when that aspect of the district court's opinion was not implicated on appeal. Putting aside this objection, the district court never described the "independent source of actionable rights" of respondent's Section 1985(3) claim. If anything, all the district court held was that Section 1985(3) reaches "racially motivated conspiracies involving federal officers." App. 144a (internal quotation marks omitted). And the district court's citation to *Li v. Canarozzi*, No. 95 Civ. 0706, 1997 WL 40979 (S.D.N.Y. Feb. 3, 1997), confirms that the district court understood this case to be about the racially motivated conspiracy to mistreat respondent. *Id.* at *4 ("Section 1985(3) is a conspiracy statute; the predicate act it addresses is a viola-

tion of the Equal Protection Clause of the Fourteenth Amendment.").[8]

In this light, it is apparent that the "independent source of actionable rights" that is implicated by respondent's Section 1985(3) claim is his right to equal protection, a right explicitly protected by the text of Section 1985(3). If there were any doubt, respondent made it crystal clear in his filings below that this is one source of his right under Section 1985(3). (Respondent Iqbal's Br. on Appeal at 145-146 ("After all, defendants cannot claim a lack of fair notice that they were prohibited from engaging in the conduct prohibited by Section 1985(3) – discrimination against a protected class of individuals for the purpose of depriving them of the equal protection of the laws.")). The Second Circuit adopted this same view of respondent's Section 1985(3) claims, making clear that it considered the claims to be rooted in the Equal Protection Clause:

> [E]ven without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy,

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[8] The Equal Protection Clause of the Fourteenth Amendment has been held to apply to federal officials, through the "reverse incorporation" doctrine. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment Due Process Clause incorporates equal protection principles of Fourteenth Amendment).

> would violate the *Equal Protection Clause*.

App. 65a (emphasis added).

In light of this, the Second Circuit's holding that respondent did not have a clearly established right to procedural due process at the time of the conduct alleged in the complaint has no bearing on the viability of his Section 1985(3) claim. Conspiring to injure respondent because of his race, religion, and national origin is a violation of Section 1985(3), and the constitution, without reference to whether respondent maintains an independent constitutional right to be free of the injury he suffered. In this case, for instance, even if respondent did not have an independent constitutional right to be free of segregated confinement in the MDC, he nonetheless had an independent constitutional right not to be segregated because of his race. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005). Similarly, to intentionally deny Muslim, Arab, or South Asian inmates access to the hearings and process afforded by the Code of Federal Regulations would be unconstitutional, regardless of whether any independent procedural due process violation arose from such a deprivation.

Seen in this light, the Second Circuit's resolution of respondent's Section 1985(3) claim is perfectly consistent with the remainder of its decision. The court below held that it was clearly established that federal officials could not discriminate on the basis of race, religion, and national origin at the time of the conduct alleged in the complaint. App. 59a-60a. The court also found that respondent's Section 1985(3) claims are based on principles of equal protection. App. 65a. Thus, the viability of respondent's Section

1985(3) claims is buttressed, not undermined, by the Second Circuit's decision on qualified immunity.[9]

c. Cross-petitioners' position is misinformed in no small part because they rely on cases involving *private* individuals sued under Section 1985(3). *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Scott*, 463 U.S. at 838; *Novotny*, 442 U.S. at 376 (1979); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Sherlock*, 84 F.3d at 525-526; *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990); *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981).[10] For private individuals, of course, conspiracy to harm someone because of racial animus does not state a claim under Section 1985(3), because the Constitution does not protect citizens against private racial animus. This explains why this Court and lower courts have limited the reach of Section 1985(3) claims against private individuals to con-

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[9] Cross-petitioners might suggest that this analysis suggests that the Second Circuit's decision is inconsistent with the district court's decision granting cross-petitioners' motion to dismiss their equal protection claim. But the correctness of the district court's ruling on the equal protection claims against cross-petitioners was not before the Second Circuit, because it was not an appealable final decision. If anything, the tension between the two outcomes suggests that the district court was wrong to dismiss respondent's equal protection claims against cross-petitioners, but this is a matter that may be taken up by respondent on motion for reconsideration in the district court or on appeal after a final order has been entered in the instant case.

[10] One exception, *Dixon v. City of Lawton*, 898 F.2d 1443 (10th Cir. 1990), is inapposite. *Dixon* involved a review of a jury verdict, and found that the plaintiff had failed to submit any evidence of discriminatory animus.

spiracies motivated by animus that target a right explicitly protected against private action by the constitution. *Bray*, 506 U.S. at 267-68 (stating requirement for proving a *private conspiracy* under Section 1985(3)). To date, only two such rights have been identified as protected against private action by Section 1985(3): the right to interstate travel, and the right to be free of slavery or indentured servitude. *Id.* at 274 (right to travel); *Griffin*, 403 U.S. at 105 (badges and incidents of slavery).

But no Supreme Court case has addressed the reach of Section 1985(3) in terms of what "independent" federal right may be protected against infringement when the defendant is a government actor rather than a private citizen. The logic of Supreme Court cases and lower court cases interpreting Section 1985(3) suggests, however, that an animus-based conspiracy to violate a plaintiff's equal protection rights is actionable under the statute. For instance, in *Griffin*, in addressing the scope of Section 1985(3) with regard to private conspiracies, the Court noted that the language of the statute is "similar to that of § 1 of the Fourteenth Amendment," and explicitly linked that language to a common understanding of "what can constitute an equal protection deprivation" when the offender is a government actor. 403 U.S. at 96-97. Nonetheless, *Griffin* established that Section 1985(3) targets all deprivations of equal protection, "whatever their source." *Id.* at 97. And *Novotny* confirmed that Section 1985(3) provides a remedy "when some otherwise defined federal right—to *equal protection of the laws* or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section." 442 U.S. at 376 (emphasis added). And in *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004), the Court

made clear that a claim could be actionable under Section 1985(3) when alleged against government actors, but not actionable when alleged against private actors, simply because of the scope of constitutional rights that run against government officials. *Id.* at 759 (dismissing First Amendment conspiracy claims because plaintiff had not shown that defendants acted under color of law and because the First Amendment does not run against private individuals). Thus, an animus-driven conspiracy by cross-petitioners to deprive respondent of his rights to equal protection is within the ambit of Section 1985(3).

Cross-petitioners might argue that requiring some class-based discriminatory animus is essentially the same as finding a violation of the Equal Protection Clause, and that allowing Section 1985(3) claims for conspiracies to violate equal protection would conflate two separate elements of the statutory claim. There are two principal responses. First, animus alone does not establish an Equal Protection Clause violation, and animus is also not necessary to establishing an Equal Protection Clause violation. Therefore, while there may be circumstances in which the evidence of animus would be the same as the evidence used to establish an "independently violated right," that will not always be the case. Second, Section 1985(3) has always been interpreted to include racially motivated conspiracies at the center of the conduct it regulates; it would therefore be strange remove from the heartland of Section 1985(3) a claim based on equal protection that most resonates with racially motivated conspiracies.

d. Cross-petitioners' remaining arguments in support of certiorari are poorly developed and not

compelling. Cross-petitioners suggest that the district court did not address the question of whether a constitutional right had been alleged or whether the right had been clearly established because the court addressed the substance of the right in the context of respondent's direct claims for violations of particular constitutional rights. Cross-Pet. 17. In fact, however, the district court addressed the arguments that cross-petitioners raised – that is the reason the district court focused on whether Section 1985(3) applied to federal officials and also whether respondent had sufficiently alleged the personal involvement of certain defendants. Cross-Pet. 17 n.6 (*see, e.g.*, Mem. Of Law In Support of Cooksey's Mot. To Dismiss at 19 (arguing only that Section 1985(3) does not apply to federal officials)).

Cross-petitioners also claim that the Second Circuit's resolution is inconsistent with *Bell Atlantic* because the allegations do not rise to the level of "plausibility." Cross-Pet. 19. The problem with this argument, other than that it again sounds in error-correction, is that cross-petitioners never raised below the issue of the adequacy of respondent's Section 1985(3) pleadings. The only arguments raised by cross-petitioners were that the statute did not apply to federal officials, and that, even if it did, its application to federal officials was not clearly established. (App. Br. for Cross-Petrs. Rardin, Sawyer, & Cooksey at 34-36). Therefore, cross-petitioners have waived any argument based on the sufficiency of respondent's pleadings.

In any event, respondent has alleged that cross-petitioners agreed to subject him to harsher conditions of confinement because of his race, religion, and national origin. And respondent has alleged the concrete steps that cross-petitioners took in this direc-

tion. On or about October 1, 2001, cross-petitioners Sawyer and Cooksey issued an order directing that September 11 detainees be held at BOP facilities under maximally restrictive conditions until cleared by the FBI. App. 168a (Compl. ¶¶ 70-71). Cross-petitioners approved the suspension for September 11 detainees of formally promulgated BOP regulations requiring individualized findings of a necessity for administrative segregation like that imposed on the ADMAX SHU. App. 157a-158a, 166a-168a, 172a-173a (Compl. ¶¶ 14-16, 64-68, 95-97). Indeed, it was cross-petitioner Cooksey who had the final responsibility to approve respondent's release to the general population of the MDC. App. 167a-168a (Compl. ¶ 68.). And cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin. App. 172a-173a (Compl. ¶¶ 96–97). These allegations suffice under *Bell Atlantic*.

The remainder of cross-petitioners' arguments regarding sufficiency of the pleadings rests on alleged inconsistencies between the Second Circuit's resolution of respondent's Section 1985(3) claims and the district court's resolution of respondent's other claims against cross-petitioners. Cross-Pet. 19-20. But this is not an argument in favor of certiorari; it only suggests that the district court's resolution of those matters, which were not before the Second Circuit, will ultimately be reversed by it.

Nor is there any evidence that the Second Circuit undermined petitioner's claims to qualified immunity. Cross -petitioners' argument in this regard rests upon the same assumption that informs the rest of their cross-petition: that the Second Circuit's Section 1985(3) ruling is incompatible with its hold-

ing that respondent's due process right was not clearly established. Cross-Pet. 22. As shown above, however, the inference cross-petitioners seek to draw from the Second Circuit's opinion is unsupported. Cross-petitioners cannot claim that the Second Circuit's resolution of respondent's equal protection claim is in conflict with its resolution of respondent's Section 1985(3) claim.

In short, cross-petitioners' attempt to suggest conflict between the Second Circuit's decision and this Court's decisions notwithstanding, the cross-petition boils down to a contention that the Second Circuit's resolution of respondent's due process claim is inconsistent with its resolution of his Section 1985(3) claim. This is not an independently certworthy question and as demonstrated above, is based on a fundamental misreading of the Second Circuit's opinion.

CONCLUSION

For the foregoing reasons, the Court should dismiss the cross-petition for certiorari as untimely, or, in the alternative, deny the cross-petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

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No. 07-1150

KATHLEEN HAWK SAWYER,
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v.

JAVAID IQBAL,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF CROSS-PETITIONERS

ARGUMENT

I. THE CROSS-PETITION WAS TIMELY FILED

In satisfaction of Supreme Court Rule 12.5, cross-petitioners filed their conditional cross-petition on March 7, 2008, within 30 days of the filing of the petition for a writ of certiorari by Petitioners John Ashcroft and Robert Mueller. *See Ashcroft v. Iqbal*, No. 07-1015. Respondent Javaid Iqbal argues, however, that the cross-petition is untimely because cross-petitioners support the position of Petitioners Ashcroft and Mueller, and they are thus not

"respondents" within the meaning of Supreme Court Rule 12.6. Respondent's Brief in Opposition ("Opp. Br.") 2, 7-12.[1]

In fact, the issues and arguments raised in Ashcroft and Mueller's petition are fundamentally different than those raised in the cross-petition. Ashcroft and Mueller argue that certiorari is warranted to consider what allegations are necessary to vitiate the qualified immunity of high-ranking government officials, noting that the Second Circuit relied on conclusory allegations in denying their motion to dismiss, reached a result inconsistent with this Court's prior decisions regarding the sufficiency of pleadings, and created a conflict with other courts of appeals. No. 07-1015, Petition 11-24. They further argue that certiorari is warranted to consider whether high-ranking government officials may be held liable in an action brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on a constructive-notice theory. *Id.* at 25-33. By contrast, cross-petitioners argue that the Second Circuit's decision departs from this Court's jurisprudence construing and applying 42 U.S.C. § 1985(3). Cross-Petition 11-24.

The arguments by Ashcroft and Mueller are distinct from those raised by cross-petitioners because their petition does not and cannot raise the issues

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[1] Supreme Court Rule 12.6 states that "[a]ll parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents." Sup. Ct. R. 12.6.

unique to cross-petitioners. The only claims remaining against cross-petitioners are Section 1985(3) claims; the other claims asserted against cross-petitioners -- including procedural-due-process claim and religious- and racial- discrimination claims-- have been dismissed by the courts below. Cross-petitioners' argument that dismissal of those claims mandates dismissal of the Section 1985(3) claims (and that the Second Circuit's failure to dismiss on this ground is a departure from Supreme Court jurisprudence) is one that cannot be advanced by Ashcroft and Mueller, who still face substantive claims pled directly under the Constitution. Indeed, 42 U.S.C. § 1985(3) is mentioned but once in their petition, and that was simply as part of their summary of respondent's claims. *See* Petition at 2. Accordingly, the fact that the conditional cross-petition also references issues addressed by petitioners, *see* Opp. Br. 10, hardly renders it supportive of the petition within the meaning of Rule 12.6. The focus of the cross-petition is, plainly and simply, an issue not even mentioned, let alone addressed, in the petition. The only common point of the two petitions is that they seek reversal of the Second Circuit's decision, but that is not enough to subject the conditional cross-petition to the strictures of Supreme Court Rule 12.6. Unsurprisingly, respondent cites no authority to the contrary.

Respondent's citations to district court proceedings that preceded the filing of the cross-petition hardly advance his position. *See* Opp. Br. 10-11. The only significance of those proceedings is that the magistrate judge rejected respondent's argument, which is repeated here, that the cross-petition was filed to avoid discovery. Accordingly, upon considering the circumstances that led to the filing of the

cross-petition, *see* Dist. Ct. Docket No. 532, the magistrate judge denied respondent's request to lift the discovery stay with respect to cross-petitioners. *See* Dist. Ct. Docket Entry dated March 26, 2008.

The cross-petition was, therefore, timely filed in accordance with Rule 12.6 and should be considered by the Court.

II. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH PRIOR SECTION 1985(3) JURISPRUDENCE

Respondent has distorted the legal and factual contours of cross-petitioners' arguments. The Second Circuit's decision left only the sixteenth and seventeenth causes of action remaining against cross-petitioners. These causes of action asserted claims under 42 U.S.C. § 1985(3) that cross-petitioners, based on animus grounded in religion and race or national origin, conspired to subject respondent to unnecessarily harsh conditions in the Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") *without due process*. As demonstrated in the cross-petition, because respondent asserted an independent procedural-due-process claim on the same grounds in his second cause of action, and because the Second Circuit dismissed that cause of action on grounds of qualified immunity, there is no legal basis on which the Section 1985(3) claims could survive.

Respondent replies by insisting that his Section 1985(3) claims are not predicated on the same procedural-due-process right underlying his second cause of action. Opp. Br. 14-17. This claim, however, defies both logic and the plain language of

respondent's own amended complaint. The sixteenth cause of action states, in relevant part:

> Defendants...agreed to deprive Plaintiffs of the equal protection of the laws of the United States because of Plaintiffs' sincere religious belief ...in violation of 42 U.S.C. § 1985(3): Defendants['] ...agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU *without due process*[.]

App.206a (emphasis added). The seventeenth cause of action makes the identical allegation, but asserts that the illegal animus was based on respondent's "race and/or national origin." App. 208a. The first clause of each cause of action merely repeats the language of Section 1985(3) and is, by itself, conclusory. 42 U.S.C. § 1985(3). It is the language that follows, however, that is operative. It explains why a violation of § 1985(3) allegedly occurred by identifying both the object of the conspiracy and the independent right violated: the placement of respondent in the SHU without procedural due process. Notably, Respondent's second cause of action -- labeled "Assignment to ADMAX SHU-Fifth Amendment Due Process" -- alleged that by implementing the policy under which respondent was "confined to solitary confinement in the ADMAX SHU in an arbitrary and unreasonable matter, without any defined criteria, contemporaneous review, or process of any sort ...Defendants ...deprived [respondent] of liberty without due process of law ...." App. 193a-194a.

Contrary to respondent's assertion, Opp. Br. 14-15, the district court fully understood that the Section 1985(3) claims were predicated on procedural due process under the Fifth Amendment. In summariz-

ing the claims, the district court pinpointed the operative sentence of the two causes of action asserted under Section 1985(3): cross-petitioners allegedly had "agreed to subject [respondent] to unnecessarily harsh conditions of confinement without due process[.]" App. 142a. Respondent fails to explain why the assertions regarding confinement and due process in the Section 1985(3) causes of action involve a right different than the one identified in the second cause of action, or why he asserted in his Section 1985(3) causes of action that he had been denied due process if he did not intend to allege that there had been due-process violations.

In addition, respondent's argument misconstrues Section 1985(3) jurisprudence. To state a cause of action under the statute, a plaintiff must allege that a defendant "conspire[d] ...for the purpose of depriving ...a person ...of the equal protection of the laws, or of equal privileges and immunities of the laws" based on "some racial, or ...otherwise class-based, invidiously discriminatory animus." 42 U.S.C. § 1985(3); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Thus, the litigants must plead and prove a "predicate" constitutional right. *See Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226 & n.2 (6th Cir. 1991); *Emanuel v. Barry*, 724 F. Supp. 1096, 1100 (E.D.N.Y. 1989) ("In other words, there must be some sort of predicate constitutional right which the alleged conspirators conspired to violate.").

In essence, therefore, a Section 1985(3) claim must allege that a person, due to some class-based animus, has conspired to deprive someone of an independent or predicate constitutional right. In *Griffin*, for example, which involved a violent attack of black men because of their race, the Court recognized that the Section 1985(3) claim was predicated on two rights: the Thirteenth Amendment's prohibition of slavery and the right of interstate travel. *See Griffin* 403 U.S. at 105-06. In *United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), this Court held: "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment." *Id.* at 833. In the present case, respondent's theory is that cross-petitioners, on the basis of animus rooted in religion and race or national origin, conspired to deprive respondent of his Fifth Amendment right to procedural due process when they placed him in the SHU.

Contrary to respondent's argument, cross-petitioners have not waived this argument because this issue first arose when the Second Circuit dismissed the independent procedural-due-process claim on the basis of qualified immunity but failed also to dismiss the Section 1985(3) allegations predicated on that same due-process right. Cross-petitioners' argument is not and has never been that respondent failed to assert an "independent right" for purposes of satisfying the elements of Section 1985(3). Indeed, the amended complaint demonstrates that the predicate right asserted by respondent is procedural due process. Rather, cross-petitioners' argument is that because respondent's Section 1985(3) claims must each be predicated on an independent right, and because that same independent right was asserted in

a separate cause of action that was dismissed on grounds of qualified immunity, the Section 1985(3) claims likewise are no longer viable.

Respondent also attempts to de-emphasize the "independent right" language referenced in Section 1985(3) jurisprudence by claiming that it is limited to cases in which there are only private, as opposed to governmental, actors. Opp. Br. 17-18. It is settled that Section 1985(3) cannot apply to private conspiracies unless the independent right sought to be vindicated prohibits private encroachment. *See Scott*, 463 U.S. at 830-33. In other words, "[w]hen no state action is involved, only those constitutional rights that exist against private actors may be challenged under the section." *Hobson v. Wilson*, 737 F.2d 1, 15 (1984). This does not mean, however, that an independent right need not be raised at all if the Section 1985(3) claim is asserted against a governmental actor. Rather, it simply means that, in such cases, the right asserted must be one that is protected from governmental infringement. *Id.* ("When state action is involved, *the whole spectrum of rights against state encroachment that the Constitution sets forth* come into play [under § 1985(3)].") (emphasis added). Notably, respondent fails to explain how this accepted distinction between private and governmental actors in Section 1985(3) jurisprudence has any bearing on the fact that his 1985(3) claims do not survive where the predicate rights that he seeks to vindicate are identical to the rights raised in claims already dismissed on the basis of qualified immunity. In any event, this tenet has been applied to cases involving governmental actors. *See Denney v. City of Albany*, 247 F.3d 1172, 1190 (11th Cir. 2002) ("Having concluded that Plaintiffs' substantive claims fail on the merits, their [Section 1985(3)] conspiracy

claim fails as well because Plaintiffs would not have been 'deprived of any rights or privilege' by the Defendants' allegedly wrongful acts."); *see also Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743 (7th Cir. 1999).

Notwithstanding the clear language of the amended complaint identifying procedural due process as the predicate independent right underlying his Section 1985(3) claims, respondent highlights the phrase "equal protection of law" in Section 1985(3) to argue that such an allegation advances a claim under the Equal Protection Clause. Opp. Br. 15-19. In meeting his obligation to identify an independent, substantive right as part of his Section 1985(3) allegations, Respondent cannot simply point to the introductory language of that statute and assert that he has pled an equal protection claim within the meaning of the Fifth Amendment. Based on the legislative history and historical context, there is no doubt that the Reconstruction Congress in the aftermath of the Civil War placed the phrase "equal protection of the laws" into Section 1985(3) in order to address class-based discrimination. *See Griffin*, 403 U.S. at 98-102. And it is clear that the Equal Protection Clause of the Fourteenth Amendment aims to combat class-based discrimination as well. Nonetheless, this Court has stated that, despite the similarity, the language of Section 1985(3) prohibiting the deprivation "of the equal protection of the laws, or of equal privileges and immunities of the laws" is not the same as the Equal Protection Clause itself. *See Scott*, 463 U.S. at 832; *Griffin*, 403 U.S. at 96-97. Rather, "equal protection" identifies "class-based [] invidiously discriminatory animus." *Griffin*, 403 U.S. at 102; *Emanuel*, 724 F. Supp. at 1102 ("[T]he Court has consistently emphasized that the statute does not

create substantive rights, thus precluding, as a matter of law, such a broad interpretation of "equal protection."). Thus, despite its requirement that there be class-based animus, Section 1985(3) does not create an independent Equal Protection Clause right that can be vindicated, and Respondent cannot seize upon the equal protection phraseology of the statute itself in an attempt to augment the substantive rights he seeks to vindicate. If Respondent had wanted to plead a substantive equal protection violation in his Section 1985(3) counts, he could have done so in the course of drafting his multiple amended complaints. But he did not.

Respondent's premise that his Section 1985(3) causes of action raise Equal Protection Clause claims rather than due-process claims is nonsensical. If all Section 1985(3) claims were assumed to invoke the Equal Protection Clause, litigants alleging private conspiracies would never be able to assert such claims since, as repeatedly noted in this Court's Section 1985(3) jurisprudence, the Equal Protection Clause prohibits only governmental encroachment. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993); *Scott*, 463 U.S. at 831-33; *Griffin*, 403 U.S. at 97-102. Accordingly, although respondent has sued governmental actors, his premise is unworkable as a legal theory of general applicability.

Even if the Section 1985(3) claims could each be construed as incorporating an Equal Protection claim, they still would not survive because the district court dismissed the independent religious and racial discrimination claims asserted in the

eleventh and twelfth causes of action as to cross-petitioners for lack of personal involvement, and thus on the basis of qualified immunity. App. 133a-137a; *see, e.g., Johnson v. Harron*, No. 91 Civ. 1460, 1995 U.S. Dist. LEXIS 7328, at *99 (N.D.N.Y. May 23, 1995). Accordingly, whether respondent's Section 1985(3) claims are predicated on equal protection or procedural due process, or both, the lower courts in this case have dismissed all causes of action independently raising those same claims.

The fact that the Second Circuit appeared to construe respondent's Section 1985(3) claims as raising Equal Protection claims, *see* App. 65a, effectively illustrates the fact that it deviated from this Court's jurisprudence. The Second Circuit failed to recognize that Section 1985(3) is not coextensive with the Fourteenth Amendment's Equal Protection Clause. *See Scott*, 463 U.S. at 832; *Griffin*, 403 U.S. at 96-97. In fact, without discussion, the Second Circuit simply assumed that an Equal Protection Clause claim was asserted in each Section 1985(3) cause of action. But regardless of which independent right was involved, the Second Circuit's ultimate failure to dismiss the Section 1985(3) claims is yet another departure from this Court's precedent. This case is worthy of certiorari because it offers this Court an ideal opportunity, not to correct a mere error as asserted by respondent, Opp. Br. 12, 14, 21, but to prevent a significant departure from its precedent and to clarify this important area of law.

Respondent's final points regarding the adequacy of the pleadings misconstrue the record. Cross-petitioners have not waived any argument regarding the sufficiency of the pleadings, *see* Opp. Br. 20, because they unquestionably have made that

argument throughout the proceedings below. The "plausibility standard" itself only became an issue after the Second Circuit rendered its decision.

Respondent's efforts to illustrate the adequacy of the allegations in the amended complaint are in vain. Opp. Br. 20. Although respondent alleges that cross-petitioners Sawyer and Cooksey were responsible for his assignment to the ADMAX SHU and oversaw the process by which September 11 detainees were placed into administrative segregation and released, Opp. Br. 20, he fails to allege with specificity how cross-petitioners allegedly took these actions as part of a conspiracy or on the basis of religion, race, or national origin. Indeed, respondent's point that "cross-petitioners knew of and agreed to establish this policy whereby detainees like respondent were confined in the ADMAX SHU for arbitrary reasons and solely because of race, religion, and national origin," Opp. Br. 20, is wholly conclusory. He thus fails to satisfy the "plausibility standard" enunciated in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Demonstrative of this inadequacy is the district court's resolution of the separate causes of action that implicated the same rights invoked in the Section 1985(3) claims. With respect to the religious and racial discrimination claims (the eleventh and twelfth causes of action), which asserted that respondent's rights were violated when he was placed in the ADMAX SHU on the basis of his religion and race, the district court dismissed those claims on grounds of qualified immunity, holding that respondent had *failed to sufficiently allege cross-petitioners' personal involvement*. App. 136-137a. Consequently, if respondent's pleadings were insufficient to allege

cross-petitioners' personal involvement in the assignment to the ADMAX SHU on the basis of religion and race or national origin, respondent's pleadings are necessarily insufficient to allege cross-petitioners' conspiracy to do the same on the basis of religion and race or national origin. App. 145a. Accordingly, respondent's Section 1985(3) claims cannot stand.

CONCLUSION

The cross-petition should be granted for the foregoing reasons and for the reasons stated in the conditional cross-petition for a writ of certiorari.

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May 22, 2008

No. 07-1150

In the Supreme Court of the United States

KATHLEEN HAWK SAWYER, ET AL.,
PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF JOHN ASHCROFT AND ROBERT MUELLER TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pleaded directly under the relevant constitutional provisions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 490 F.3d 143.[1] The order of the district court (Pet. App. 71a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (Pet. App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that

[1] As in the cross-petition, references to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Ashcroft* v. *Iqbal*, No. 07-1015 (filed Feb. 6, 2008).

time to February 6, 2008. The petition for a writ of certiorari in No. 07-1015 was filed on February 6, 2008. The conditional cross-petition for a writ of certiorari was filed on March 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves civil claims brought by Javaid Iqbal (plaintiff), a citizen of Pakistan who was arrested by federal officials in New York City following the September 11, 2001 terrorist attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on criminal charges. See Pet. App. 3a-4a.[2]

In the underlying petition, *Aschroft* v. *Iqbal*, No. 07-1015 (filed Feb. 6, 2008), petitioners John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, seek this Court's review of the questions (1) whether conclusory allegations that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and (2) whether a cabinet-level official or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly

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[2] The complaint was filed by two plaintiffs: Iqbal and Ehab Elmaghraby. See Pet. App. 154a. Elmaghraby settled his claims, and the district court entered an order of voluntary dismissal in February 2006. In describing the history of the case, we address only those claims brought by Iqbal.

carried out by such subordinate officials. The court of appeals held that plaintiff's allegations were sufficient to state a valid claim against several defendants (including Ashcroft and Mueller) for racial or religious discrimination, as well as for conspiracy to commit such discrimination. Pet. App. 58a-63a, 65a.

2. The conditional cross-petition was filed by defendants Kathleen Hawk Sawyer, Michael Cooksey, and David Rardin, who were, at the relevant time, the Director of the Federal Bureau of Prisons, the Assistant Director for Correctional Programs of the Bureau of Prisons, and the Director of the Northeast Region of the Bureau of Prisons, respectively. Pet. App. 157a-158a. Plaintiff alleges that Sawyer and Rardin were "responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiff[]," and that Cooksey was "responsible for ensuring a safe and secure institutional environment for" those individuals. *Ibid.* Plaintiff alleges that all three cross-petitioners were "instrumental in the adoption, promulgation, and implementation of the policies and practices challenged" and that they "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" to which he claims he was subjected. *Ibid.*; see also *id.* at 190a-191a (including cross-petitioners among the defendants who allegedly "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement").

In addition to those general allegations, plaintiff's complaint asserts a number of specific allegations against cross-petitioners. He alleges that "post-September 11th detainees [at the MDC] were not afforded any hearings" and "remained under restrictive detention in the [Administrative Maximum Special Housing Unit (ADMAX SHU)] as a matter of policy until [cross-petitioner] COOKSEY issued a memorandum approving their release to general popula-

tion." Pet. App. 167a-168a. Plaintiff alleges that "COOKSEY directed that all detainees 'of high interest' be confined in the most restrictive conditions possible until cleared by the FBI," and that cross-petitioner "SAWYER was aware of and approved of the policies enunciated by * * * COOKSEY with regard to the confinement of detainees 'of high interest' in BOP facilities." *Id.* at 168a. Plaintiff also alleges that Sawyer, Rardin, Cooksey, and other high-level officials "willfully and maliciously designed a policy whereby individuals such as Plaintiff[] were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue." *Id.* at 173a.

Plaintiff alleges that he was subjected to unreasonable, unnecessary, and extreme strip and body-cavity searches, and that cross-petitioners, among others, "willfully and maliciously approved of, endorsed, and/or ordered that these searches take place" and "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to unreasonable, unnecessary and extreme strip and body-cavity searches." Pet. App. 182a. Plaintiff alleges that cross-petitioners also knew or should have known of an unlawful custom and practice in the MDC of imposing unreasonable and extreme strip and body-cavity searches, and that they acted with deliberate indifference and/or reckless disregard by failing to prevent their subordinates from conducting unreasonable, unnecessary, and extreme strip searches. *Id.* at 182-183a.[3]

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[3] Plaintiff also alleges that Sawyer "knew of and condoned" substantial restrictions on his right to communicate with counsel, Pet. App. 187a, but he did not name Sawyer in his Sixth Amendment claim. *Id.* at 196a-197a.

Plaintiff also alleges that he was subject to various types of mistreatment by lower-level BOP officials, and that cross-petitioners, among others, "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Pet. App. 172a-173a.

In total, plaintiff has brought nine causes of action against cross-petitioner Sawyer and eight causes of action against cross-petitioners Cooksey and Rardin. Plaintiff alleges that all three cross-petitioners violated his right to procedural due process by subjecting him to extreme and restricted conditions of confinement "in an arbitrary and unreasonable manner, without any defined criteria, contemporaneous review, or process of any sort." Pet. App. 193a (Claim 2). Plaintiff alleges that Sawyer violated the Fourth Amendment by "willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiff[] [was] repeatedly subjected to unreasonable and unjustified strip and body-cavity searches." *Id.* at 199a-200a (Claim 9). He alleges that all three cross-petitioners engaged in unlawful religious discrimination in violation of the First Amendment "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions on confinement on Plaintiff[] because of [his] sincere religious beliefs." *Id.* at 201a (Claim 11). He alleges that all three cross-petitioners also engaged in unlawful racial discrimination in violation of the Equal Protection Clause "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiff[] because of [his] race." *Id.* at 202a (Claim 12). He claims that all three cross-petitioners vio-

lated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1, by "imposing harsher conditions of confinement" on him "because of [his] sincere religious beliefs." Pet. App. 203a (Claim 13). In the claims that are most relevant to the cross-petition, plaintiff also alleges that all three cross-petitioners are liable for conspiracy to commit religious and racial discrimination under 42 U.S.C. 1985(3), as a result of their alleged "agreement to subject Plaintiff[] to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law," as well as their alleged agreement "to subject Plaintiff[] to unnecessary and extreme strip and body-cavity searches as a matter of policy." Pet. App. 206a-207a (Claim 16), 208a-209a (Claim 17). Finally, plaintiff alleges that all three cross-petitioners are liable under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for violation of "customary international law prohibiting cruel, inhuman or degrading treatment." *Id.* at 213a (Claim 21).

3. The district court dismissed some but not all of plaintiff's claims against cross-petitioners. The court held that the procedural-due-process claim, Claim 2, survived dismissal because plaintiff had a protected interest in not being confined in highly restrictive conditions for longer than ten months and that the reasonableness of the defendants' conduct could not be determined on a motion to dismiss. Pet. App. 109a-113a. The district court also declined to dismiss the claim on qualified-immunity grounds, reasoning that there were "factual disputes concerning the nature of the defendants' actions and the need for those actions in light of the investigative and security concerns at the time." *Id.* at 115a. The court concluded that allegations of the personal involvement of high-level defendants, including the cross-petitioners as well as petitioners Ashcroft and Mueller, were sufficient at the motion to dismiss stage

when viewed in the context of the aftermath of the September 11th attacks. *Id.* at 116a-118a.

The district court dismissed the Fourth Amendment claim against the cross-petitioners, Claim 9, on the grounds that plaintiff had failed to allege adequately their personal involvement in the challenged searches. Pet. App. 130a-131a.[4] The district court also dismissed the claims against all three cross-petitioners for racial and religious discrimination, Claims 11 and 12, on the ground that plaintiff had not alleged that they were involved in the allegedly discriminatory classification of plaintiff as being "of interest" to the ongoing terrorist investigation. *Id.* at 136a-137a.

The district court dismissed the RFRA claim against cross-petitioners, Claim 13, on qualified-immunity grounds, holding that it was not clearly established at the time of the events at issue that RFRA applied to federal officials. Pet. App. 137a-142a. It also dismissed the ATS claim, Claim 21, holding that the United States was properly substituted as the defendant under the Federal Tort Claims Act, 28 U.S.C. 2679(b), and that the United States had not waived its sovereign immunity for a lawsuit for money damages for violation of international law. Pet. App. 146a-149a.

The district court declined to dismiss the conspiracy claims against cross-petitioners, Claims 16 and 17, except to the extent they were based on their actions in subjecting the plaintiff to strip and body-cavity searches. Pet. App. 145a. The district court noted that the plaintiff had not

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[4] The district court noted that it was unclear whether the Fourth Amendment claim was brought only against Sawyer, or also against Cooksey and Rardin. See Pet. App. 131a n.24. As to all three cross-petitioners, however, the district court held that the allegations failed to establish sufficient personal involvement to state a valid claim. See *id.* at 130a-131a & n.24.

sufficiently alleged the personal involvement of the cross-petitioners in those alleged constitutional violations. *Ibid.*

Accordingly, following the district court's order, the claims remaining against the cross-petitioners were Claim 2, for violation of procedural due process, and Claims 16 and 17, for conspiracy to violate plaintiff's civil rights, but only to the extent those conspiracy claims were predicated on an alleged agreement to violate the plaintiff's right to procedural due process.

4. Various defendants, including cross-petitioners, filed appeals from the district court's partial denial of their motions to dismiss the claims against them on grounds of qualified immunity. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-70a.

The court of appeals held that the procedural due process claim, Claim 2, should be dismissed on qualified-immunity grounds, because reasonable government officials could legitimately question "whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system." Pet. App. 43a-46a.

The court of appeals upheld the other claims at issue on appeal, including a substantive-due-process claim, Pet. App. 46a-50a; an excessive force claim, *id.* at 50a; a claim of interference with plaintiff's right to counsel, *id.* at 51a; a claim of violation of the Fourth Amendment through unreasonable and unnecessary strip and body-cavity searches, *id.* at 51a-56a; interference with religious practices in violation of the First Amendment, *id.* at 56a-58a; and race and religious discrimination claims, *id.* at 58a-63a. None of those claims were brought against cross-petitioners—a point that the court of appeals explicitly noted with reference to the

discrimination claims (calling cross-petitioners the "BOP Defendants"), *id.* at 59a & n.12.

The court of appeals also upheld the conspiracy claims brought under 42 U.S.C. 1985(3), rejecting arguments that they were barred by qualified immunity because it was not clearly established that federal officials were subject to liability under Section 1985(3) and that the allegations of conspiracy were too conclusory to state a valid claim for conspiracy. Pet. App. 63a-65a. On the second point, the court of appeals reviewed the allegations under "the normal pleading rules previously discussed" in its analysis of the alleged constitutional violations, holding that under those standards "Plaintiff's allegations of a conspiracy to discriminate on the basis of ethnicity and religion suffice to withstand a motion to dismiss." *Id.* at 65a. The court of appeals did not address in any manner the specific allegations against cross-petitioners that were the basis for the conspiracy claims against them.

The court of appeals denied motions for rehearing or rehearing en banc filed by plaintiff and by two different sets of defendants. Pet. App. 151a-152a. Cross-petitioners did not seek rehearing or rehearing en banc.

ARGUMENT

The cross-petition for a writ of certiorari should be held for disposition after the petition in No. 07-1015.

1. As described above, the conspiracy claims brought against cross-petitioners were based on their alleged agreement to deprive plaintiff of procedural due process, to subject plaintiff to unnecessary and extreme strip and body-cavity searches, and to discriminate against him on the basis of his race and religion. The district court dismissed the claims that cross-petitioners violated plaintiff's Fourth Amendment rights by subjecting him to unnecessary and

extreme strip and body-cavity searches, holding that there were inadequate allegations to establish cross-petitioners' personal involvement. Pet. App. 130a-131a & n.24. It also dismissed the conspiracy claims against cross-petitioners to the extent they were based on an alleged agreement to subject plaintiff to strip and body-cavity searches. *Id.* at 145a-146a. Furthermore, the district court dismissed the claims brought against cross-petitioners for racial and religious discrimination, Claims 11 and 12, on the ground that plaintiff's allegations did not show any personal involvement by cross-petitioners in the allegedly discriminatory classification of plaintiff as being "of interest" to the terrorist investigation. *Id.* at 136a-137a.

Once the case was before the court of appeals, therefore, the only remaining direct claim against cross-petitioners was for violation of procedural due process, and the only remaining conspiracy claim was based on cross-petitioners' alleged agreement to violate plaintiff's procedural-due-process rights. The court of appeals held that the procedural-due-process claim should be dismissed, on the ground that it was barred by qualified immunity. Pet. App. 43a-46a.

Cross-petitioners argue that the court of appeals erred in failing to require dismissal of the claim under 42 U.S.C. 1985(3) for conspiracy to violate plaintiff's procedural-due-process rights, once that court had already held that the allegations of a direct constitutional violation were inadequate to overcome qualified immunity. Cross-Pet. 16, 22. Furthermore, cross-petitioners assert that the conspiracy claim could not have been predicated on an alleged agreement to commit unlawful strip and body-cavity searches or to unlawfully discriminate against plaintiff by selecting him as a detainee "of interest" to the terrorist investigation on the basis of his race or religion. Cross-Pet. 19. Because the district court had previously held that the allegations

against cross-petitioners were inadequate to establish their personal involvement in those alleged constitutional violations, cross-petitioners argue that the same allegations were inadequate to support a claim for unlawful conspiracy. Cross-Pet. 17-18.

2. The question presented in the conditional cross-petition was not raised in the court of appeals, nor did that court explicitly resolve it in affirming in part the decision of the district court. The court of appeals may have believed that its conclusion that respondent's allegations were inadequate for purposes of stating a claim of a *direct* constitutional violation sufficient to overcome qualified immunity effectively disposed of plaintiff's conspiracy claim based on the same conduct, or the court's failure to address this issue may have been inadvertent. Nevertheless, it would be error to allow the conspiracy claims against cross-petitioners to proceed when the court of appeals properly recognized that the claims of a direct constitutional violation of plaintiff's right to procedural due process were defective. Such a result would allow plaintiffs to use Section 1985(3) as a means of circumventing the pleading and qualified-immunity standards that protect government officials from having to expend their time and resources in defending against meritless litigation.

In any event, to the extent that the conspiracy claims against cross-petitioners are still alive, the disposition by this Court of other claims against petitioners Ashcroft and Mueller may shed light on the pleading and qualified immunity standards governing the proper disposition of the Section 1985(3) conspiracy claims against cross-petitioners. Accordingly, if this Court grants a writ of certiorari in No. 07-1015, it should hold the cross-petition pending the disposition of No. 07-1015 and dispose of it in accordance with its decision in No. 07-1015.

CONCLUSION

The cross-petition for a writ of certiorari should be held for disposition after the petition in No. 07-1015.

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